IN THE

Supreme Court of the United States

October Term, 1943.

No. 115

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

vs.

LANE-WELLS COMPANY, a corporation, and TECHNICRAFT ENGINEERING CORPORATION,

Respondents.

BRIEF FOR THE RESPONDENTS.

RAPHAEL DECHTER,

633 Subway Terminal Building, Los Angeles,

Attorney for Respondents.

HARRY A. PINES,

Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles

TABLE OF AUTHORITIES CITED.

CASES.

MISCELLANEOUS.

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Opinions Below.

The opinion of the Board of Tax Appeals [R. 47, 85] is reported at 43 B. T. A. 463. The original opinion of the Circuit Court of Appeals was withdrawn and does not appear in the record. The opinion of the Circuit Court of Appeals on petition for rehearing [R. 277, 283] is reported at 134 Fed. (2d) 977.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered February 10, 1943 [R. 276-277]. A petition for rehearing was denied March 22, 1943 [R. 277]. The petition for writ of certiorari was filed on June 22, 1943 and granted October 11, 1943. The

petitioner relies upon section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 in support of the Court's jurisdiction.

Statement of the Case.

The statement contained in petitioner's brief appears to be a fair statement of the facts, except that it omits a recitation of some of the findings which are pertinent to an understanding of the instant case. Without reiterating the facts stated by petitioner, we shall supplement the same with the relevant matter that is not contained in petitioner's statement.

The returns of Technicraft Engineering Corporation (hereinafter referred to as Technicraft) for the years 1934, 1935, 1936 and 1937 filed on Form 1120 within the time required by law, contained a full disclosure of its gross income and deductions and resulting net income for those years [R. 49-50]. Technicraft's income tax returns were prepared by its accountant, a certified public accountant, engaged in tax work, who gave Technicraft his opinion that it was not a personal holding company [R. 64]. This accountant had conferences with representatives of the Bureau of Internal Revenue and gave them access to Technicraft's books and records [R. 65]. On June 19, 1937, Technicraft received a refund of $278.37 in respect of income and excess profits taxes paid by it for the year 1935 and at that time the Commissioner made no claim that Technicraft was a personal holding company [R. 65].

Technicraft did not file any returns on Form 1120H because, in good faith, it did not believe it was a personal holding company [R. 79].

Demonstrative of the good faith of Technicraft in believing it was not a personal holding company is the entire record upon which that issue hinged [R. 116-262, inclusive]. It must be noted that the determination of the Board of Tax Appeals that Technicraft was taxable as a personal holding company was not due to a finding that 80% or more of its income was from personal holding company income as defined by the statute, but that Technicraft had failed to make such a segregation or apportionment in its presentation of evidence before the Board as to segregate that which was personal holding company income from that which was not personal holding company income [R. 68, 70, 283]. It was the failure of the Circuit Court of Appeals to remand the case back to the Board to permit respondents to present such evidence that would have shown that over 20% of the taxed income was not "royalty" income, that was responsible for respondents seeking a petition for writ of certiorari herein. Respondents' petition for a writ of certiorari was denied. Had the opportunity to present the evidence been given to the respondents, it would have disclosed that far less than 80% of its taxed income was personal holding company income. This is important here because it makes it obvious that Technicraft had a right to believe, in good faith, that it was not a personal holding company.

Argument.

The returns filed by the taxpayer in this case were sufficient to start the running of the statute of limitations and to avoid the imposition of penalties. In his brief, the petitioner refers to his brief in *R. Simpson & Co., Inc. v. Commissioner of Internal Revenue*, No. 1, this Term. Petitioner asserts therein that it was Congressional intent that the personal holding company tax constitute a "wholly separate tax" from the income taxes provided by Title I (Commissioner's Brief. *Simpson* case, p. 32.) A survey of the legislative history fails to sustain this conclusion. All of the quotations cited by the petitioner and gleaned from Committee Reports are consistent with the theory that Section 351 of the Revenue Act of 1934 constituted a *surtax* or an *additional income tax*. The Congressional commentary as well as the Act itself is entirely inconsistent with treatment of section 351 as a wholly *independent* tax.

As originally submitted by the House Ways and Means Committee, the heading of section 351 read as follows: "Tax on Personal Holding Companies." This heading was revised by the Senate Finance Committee and, when enacted, read: "Surtax on Personal Holding Companies."

> *Seidman's Legislative History of Federal Income Tax Law*, 1938-1861, p. 394.

The distinctiveness of the description as a "Tax" was shunned by the Congress in favor of the description "Surtax," which *eo nomine* suggests interdependence upon another or primary tax. As originally submitted by the House Ways and Means Committee, subdivision (a) of section 351 referred to the personal holding company tax liability as a "Tax." This designation was reformed,

however, by the Senate Finance Committee and when finally enacted such tax liability was referred to as a "Surtax." (*Seidman's Legislative History, etc.*, p. 394.) Whether section 351 was to be a wholly "separate" tax as contended by the petitioner, or whether it was to be an "additional or surtax" as we contend, is made plain by the report of the Senate Finance Committee, 73rd Congress, 2nd Session, S. Rept. 558, in the following language:

> "In view of this situation, your Committee has rewritten the section[1] dealing with personal holding companies and has placed it in Title I(a), section 351 and *it has been made plain that this is an additional graduated income tax, or surtax, on personal holding companies.*" (Italics ours.)

Respondent assumes that because paragraph (c) of section 351 makes applicable to Title IA the administrative provisions of Title I, that such paragraph has the inferential effect of providing for a separate return to be filed by personal holding companies. We cannot agree with this conclusion.

The fallaciousness of respondents' theory is revealed by an examination of other portions of the Revenue Act of 1934 and subsequent acts. From such examination it becomes evident that Congress could not have contemplated that paragraph (c) of section 351 would have the effect of requiring a separate return.

It will be noted that paragraph (b) of section 702 of the *same* Revenue Act of 1934 respecting capital stock

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[1]Section 102 of the Revenue Act of 1934.

taxes (Title V) is in words *identical* to paragraph (c) of section 351. Yet, paragraph (d) of section 701 specifically reads as follows:

> "(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed, to the Collector for the District in which is located its principal place of business, or, if it has no principal place of business in the United States then to the Collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe * * *."

By the same token, the Revenue Act of 1936 in providing for a tax on unjust enrichments (Title III) contains a provision practically identical with paragraph (c) of section 351. Paragraph (a) of section 503 of the Revenue Act of 1936, in almost identical language to paragraph (c) of section 351, makes applicable with respect to the taxes imposed by Title III, the provisions of law applicable to Title I. That this provision was not intended to be a substitute for a provision requiring the filing of a separate return is evident from paragraph (b) of section 503 of the Act of 1936, which requires every person subject to tax under Title III to "make a return under this Title, which return shall contain such information and be made in such manner as the Commissioner, with the approval of the Secretary, shall prescribe."

In the case of *United States v. Atchison, T. & S. F. R. Co.*, 220 U. S. 37, 31 S. Ct. 362, 55 L. ed. 361, this Court said:

> "The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied."

It is noted that the Conference Report (House Finance Report, 1385, 73rd Congress, 2nd Session, p. 20) recites that "the Senate amendment provides for a separate return for the purpose of this surtax on personal holding companies. All provisions of law in respect to the taxes imposed by Title I are applicable to this return except that the foreign-tax credit imposed by section 131 is not allowed." The fact that the Act, as enacted, did not contain a specific provision for a separate return, necessarily points to the conclusion that any such provision which was contained in the Senate amendment was purposely stricken prior to the enactment of section 351.

The very fact that Congress made the provisions of Title I applicable to Title IA is in itself indicative of the fact that Congress did not intend to isolate Title IA from Title I. The heading "Additional Income Taxes" reveals an intent to supplement by addition rather than to create a category of distinctiveness. The use of the word "surtax" rather than "tax" reveals an intent to create a supplementary or additional tax rather than an independent and separate tax. The selection of the letter "A" to be added to Title I thus naming the new chapter

Title IA rather than the use of a separate and wholly integral number such as VII or VIII for the new tax, reveals an intention to create an interrelationship with Title I other than the wholly separateness that the Commissioner now seeks to read into the section.

Section 351 is in effect merely another *surtax* on corporation income. It is sister to Section 102 of the Revenue Act of 1934 (Title I) governing surtax on the income of corporations improperly accumulating surplus. Thus paragraph (e) of Section 102 provides: "For surtax on personal holding companies, see section 351."

Similarly, paragraph (e) of Section 351 provides: "For surtax on corporations which accumulate surplus to avoid surtax on stockholders, see section 102."

Both section 102 under Title I and section 351 under Title IA refer to surtax on corporations. The object of both sections was to avoid the withholding by corporations of distribution of earnings to their stockholders and thereby avoid the payment by stockholders of taxes on earnings that would otherwise be distributed to such stockholders. Section 102 is designed to cover both holding companies and other corporations. Section 351 was merely designed to make conclusive instead of *prima facie* evidence that a company was a holding company, by the legal effect given to certain definitions involving stockholdings and nature of earnings.

Report—Ways and Means Committee (73d Cong., 2d Sess., H. Rept. 704):

> "Your committee therefore recommends that the present section 104 be divided into two parts, one dealing with the personal holding company and the other with all other corporations which accumulate

unreasonable surpluses. The part dealing with personal holding companies is new, while the present law has been retained with a few modifications to reach the other companies. (See secs. 102 and 103 of the bill.)"

Report—Senate Finance Committee (73d Cong., 2d Sess., S. Rept. 558):

"The effect of this system is to provide for a tax which will be automatically levied upon the holding company without any necessity for proving a purpose of avoiding surtaxes. It is believed that the majority of these corporations are in fact formed for the sole purpose of avoiding the imposition of the surtax upon the stockholders.

"The fact that some companies, such as real estate companies, have been placed outside the scope of this provision does not result in a serious opportunity for tax avoidance. Such companies, and, in fact, all other corporations, are still subject to section 102 of the bill. That section is similar to section 104 of existing law and applies a surtax to any corporation formed or availed of for the purpose of preventing imposition of surtaxes upon its shareholders. * * *"

Subdivision (d) of Section 102 under Title I is verbatim the same as subdivision (d) of Section 351 under Title IA. This is another circumstance to indicate that the same type of surtax was involved as is provided under Title I.

Wholly inconsistent with the theory that Title IA is wholly separate and independent of Title I, is the repeated cross-references in Title IA to provisions contained in Title I. Thus Section 351 refers to Sections 13, 204, 115, 23(o), 117(d), 131, and 102, all contained in Title I.

The only logical conclusion to be drawn from these facts is that the division into separate titles was simply a design for ready reference to the provision rather than intentional creation of a new category of taxation. This Honorable Court was confronted with a somewhat similar situation in the case of *Ozawa v. United States*, 260 U. S. 178, 43 S. Ct. 65, 67 L. ed. 199. There as here an unintended significance was sought to be attached to a statute which was placed by Congress in a title apart from other sections bearing upon the same subject matter. There, as here, the statute referred to "this title." This Court said:

> "The division of the Revised Statutes into titles and chapters is chiefly a matter of convenience, and reference to a given title or chapter is simply a ready method of identifying the particular provisions which are meant."

Were there any doubt, then such doubt is erased by the comments of Congressional Committees referring to the tax as a surtax and as an additional tax and not as a wholly separate tax. That the use of the word "surtax" was intentional and advised is without doubt, after considering that when originally submitted by the House Ways and Means Committee the word used was "tax", and subsequently abandoned in favor of the use of the word "surtax." The Commissioner's attempt to strain the natural meaning of the language of the Act and the legislative commentaries bespeaks of ingenuity but not of logic. It is a plain case of an attempt by the Commissioner and the Secretary of the Treasury to legislate for purposes of convenience beyond the limitations of regulations permitted. The Commissioner and the Secretary could have easily prescribed, instead of the requirement of a separate

return, the adding of two or three questions to the regular corporate income tax return, which would have been adequate to disclose all the information needed by the Commissioner to enforce the provisions of section 351.[2]

To further illustrate how illogical the contention of the Commissioner is that a separate return was necessary: it cannot logically be contended that a corporation coming within the provisions of section 102 would be subject to a penalty and also be disentitled to take advantage of the statute of limitations under Title I if the Commissioner had provided for a separate return for corporations embraced by section 102 notwithstanding the filing of a regular return of the corporation containing the information upon which the tax under section 102 could be computed. The Commissioner cannot adopt regulations which are in effect legislation. In the case of *Credit Alliance v. Helvering,* 316 U. S. 107, 86 L. Ed. 1307, 62 S. Ct. 989, this Court held that the regulation of the Commissioner in that case in fact constituted legislation on a matter which was reserved to Congress. Just as the information under section 351 could have been secured by a few additional questions to Form 1120, so the same information could be secured pertaining to section 102 on the one regular form. No separate return was required by the Commissioner under section 102. If the Commissioner had

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[2]Form 1120 contains the question: "Is the corporation a personal holding company within the meaning of section 351 of the Revenue Act of 1934?" Two other or further questions could have provided all information needed, such as (1) Is 50% or more of the stock owned by five or less persons? (2) Was 80% or more of the income of this corporation derived from royalties, dividends, interest, annuities and (except in cases of regular dealers in stock or securities) gains from the sale of stock or securities?

required a separate return and the taxpayer in good faith had not filed such a separate return, but had merely filed a regular return under Form 1120, the situation would be no different than the one in *Germantown Trust Co. v. Comm.*, 309 U. S. 304, where the taxpayer filed a fiduciary return instead of filing a corporate return.

Where a corporate taxpayer, in good faith, files a return on Form 1120 but for reasonable cause does not file a personal holding company return, can it be said that there was a "failure to file a return" within the meaning of sections 276(a) and 291 of the Revenue Acts of 1934 and 1936? The information called for by Form 1120H is information that could have been called for by Form 1120. The means of determining tax liability under Title IA was by section 351(c) shifted to such returns as were required under Title I. Can it therefore be said that a return required by Title I which would disclose income tax liability under Title IA and which is filed on the wrong form of return (in absolute good faith and for reasonable cause) is a failure to file a return within the meaning of Sections 276(a) and 291 of the Revenue Acts of 1934 and 1936? The answer has been heretofore expressed by the United States Supreme Court in *Germantown Trust Company v. Commissioner*, 309 U. S. 304, which the Commissioner now ineffectively seeks to distinguish. In the Germantown case a fiduciary filed a return on Form 1041 instead of Form 1120 designed by the Treasury Department for associations taxable as corporations. The Commissioner contended that the filing of Form 1041 did not set the statute of limitations in operation. The Circuit Court of Appeals for the Third Circuit upheld the Commissioner's contention, which was similar to his

contention in this case to the effect that the filing of a wrong form of prescribed return was not sufficient to start the operation of the statute of limitations. On February 26, 1940, this court reversed the judgment of the Circuit Court of Appeals. The Court construed sections 275 and 276 of the Revenue Act of 1932 (not changed in the Revenue Act of 1934 ,which is applicable herein) in the light of the meaning of section 1002(a) of the Revenue Act of 1926 as amended by section 579 of the Revenue Act of 1934, which governs the jurisdiction of a Circuit Court of Appeals to review a decision of the Board of Tax Appeals. Section 1002(a) as amended, reads as follows:

> "Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of Appeals for the Circuit in which is located the Collector's office to which was made the return of tax in respect of which the liability arises, or, if no return was made, then by the Court of Appeals of the District of Columbia."

It was the decision of this court in the *Germantown* case that a return which is sufficient to invoke the jurisdiction of the Circuit Court of Appeals, is a return within the meaning of section 276(a), providing that there shall be no period of limitations in the event no return is filed. To properly distinguish the *Germantown* case from the instant case, the Commissioner must direct his argument to the inapplicability of the reasoning in the *Germantown* case to the facts of the instant case. This he has not done. We respectfully submit that he cannot do this. In respondent's petitions to the United States Circuit Court of Appeals, for the Ninth Circuit, for a review of the decision of the Board of Tax Appeals, the taxpayer recited: "The tax-

payer filed income tax returns for the taxable years 1934, 1935, 1936 and 1937, with the Collector of Internal Revenue for the Sixth Collection District of the State of California, whose office is located within the Ninth Judicial Circuit wherein the taxpayer did reside." [R. 107. See also petition of taxpayer's transferee, R. 96.] The recital of the foregoing jurisdictional fact was to invoke the jurisdiction of the Ninth Circuit Court of Appeals. It will be noted that the Commissioner did not deny the fact that the filing of these returns was sufficient to vest the Circuit Court of Appeals for the Ninth Circuit with jurisdiction to review the decision of the United States Board of Tax Appeals. In fact, in a separate petition for review (later dismissed) the Commissioner himself invoked the jurisdiction of the Ninth Circuit Court of Appeals to review the same decision of the Board of Tax Appeals thereby recognizing the effectiveness of these returns as sufficient to vest the Circuit Court of Appeals for the Ninth Circuit with jurisdiction. No contention is being made herein that the returns were not sufficient under section 1002(a) of the Revenue Act of 1926 as amended by section 519 of the Revenue Act of 1934 to empower the Circuit Court of Appeals for the Ninth Circuit to entertain a review because the "return of the tax in respect to which the liability arises" was made in the "Circuit in which is located the collector's office to which was made the return of the tax." The determining factors thereupon correspond on all fours with the principles involved in the *Germantown* case. This Court, speaking through Mr. Justice Roberts said:

> "We are of the opinion that if the return filed by the petitioner was such as to create venue of the proceedings for review in the court below, it was also

a return under the terms of section 275(a), so that the two year period of limitations imposed by that section is applicable."

Petitioners contend that the *Germantown* case is distinguishable because the court therein recited that the fiduciary form filed by the taxpayer in that case on Form 1041 instead of Form 1120 was nevertheless sufficient because it "contained all of the data from which a tax could be computed and assessed, although it did not purport to state any amount due as tax" (Commisisoner's Brief in *Simpson* case, p. 38. See also Petitioner's Brief, pp. 13 to 17). The Commissioner contends that the instant case presents a situation different from that of the *Germantown* case, inferring that in the instant case the Form 1120H did not contain "all of the data from which a tax could be computed and assessed." It is appropriate first to examine the difference between Forms 1120 and 1041, which were involved in the *Germantown* case. Form 1120, which was not filed in that case called for information not called for by Form 1041, and the omissions of such information are far more substantial than any omissions that might be attributable to failure of a corporation filing Form 1120 and failing to file Form 1120H. By filing Form 1041 in lieu of Form 1120 in the *Germantown* case the taxpayer there gave no information concerning the value of capital stock declared for purposes of capital stock tax, the net income from excess profits tax computation, the information required with respect to date of incorporation, location of the corporation's books, the kind of business the corporation was engaged in, compensation of officers, type of business conducted, history of affiliation with other corporations, and other information par-

ticularly identified with corporations. Nevertheless even though Form 1041 was not designed for corporations and did not disclose the information upon which it could be determined that the taxpayer was a corporation or taxable as a corporation, *it contained sufficient information from which the tax could be computed.* Having been filed in good faith this Court held that it was a return within the meaning of section 276(a) sufficient to start the running of the statute of limitations.

In the instant case, it cannot be said as inferred by the Commissioner, that the returns of the taxpayer did not contain all of the data from which a tax could be computed and assessed. The finding of the Board of Tax Appeals, unchallenged by the Commissioner was that the returns fully reported gross income and total deductions. It was undisputed that the taxpayer filed returns on Form 1120 for the calendar years involved, which were full and complete aside from such minor adjustments by the Commissioner made in his determination of the deficiency [R. 78, 79]. The Commissioner argues that the failure to file Form 1120H was the cause of the Commissioner not having information from which he could determine that a personal holding company was involved. This is different from the information which would enable him to compute the tax. It should be noted that in the *Germantown* case the return filed was sufficient to enable the Commissioner to compute the tax although obviously it was not sufficient to enable the Commissioner to determine that an association taxable as a corporation was involved. In this case both the Board and the Circuit Court definitely found that the return as filed contained all of the information necessary for the computation of the tax except the mere

matter of mathematical computation by applying the rates to the income reported on the return already filed [R. 278]. Here again the Commissioner's attempt to distinguish the *Germantown* case is ineffectual.

As this Court stated in *Zellerbach Paper Co v. Helvering*, 293 U. S. 172, 79 L. Ed. 264, 55 S. Ct. 127:

> "Perfect accuracy or completeness is not necessary to rescue a return from nullity, and if it purports to be a return, is sworn to as such * * * and evinces an honest and genuine endeavor to satisfy the law. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary."

The Commissioner, however, contends that the return which Technicraft filed on Form 1120, in addition to not disclosing that it was a personal holding company, also did not "*permit of an accurate* computation of that tax" (Petitioner's Brief, p. 13). The use of the word "accurate" by the Honorable Attorney General is a significant admission. It would be impossible for the Commissioner to contend that the returns filed herein did not permit of a computation of the tax. The return had all of the information necessary for the determination of the tax. The only omissions which would affect the amount of tax were omissions of information which would have had the effect of *lowering* the personal holding company tax liability. Thus Form 1120H would have supplied information as to contributions or gifts not deducted in computing Title I net income for income tax paid to a foreign country or United States possession, dividends received from personal holding companies, and amounts used or set aside to retire indebtedness, all of which are deductible.

This information was for the benefit of the taxpayer. The taxpayer had the right not to claim these deductions. The computation of personal holding company taxes is based upon "undistributed adjusted net income." The term "adjusted net income" is defined by section 351(b)(3) as net income computed without allowance of the dividend deduction otherwise allowable, but minus the sum of the deductions heretofore mentioned. Section 351(b)(4) provides that the terms used in the section shall have the same meaning as when used in Title I. It is, therefore, apparent that the computation of the tax is based upon the information contained in Form 1120. The information required to fully compute the tax without deductions to the taxpayer was fully disclosed to the Commissioner by the return [R. 49]. This finding was accepted by the Circuit Court of Appeals, the court stating that the Board had found that the taxpayer's "returns" showed "all the facts necessary for the respondent (Commissioner) to compute the taxes as a personal holding company obligation" [R. 278]. *The attempted challenge of the finding contained in the footnote 4, page 16 of the petitioners' brief is the first attempt of the Commissioner to challenge the finding of the Board.* It is significant that no challenge to the sufficiency of the evidence to support the Board's findings is contained in the specifications of errors to be urged at the hearing before this Court. No such error was assigned to the Circuit Court of Appeals. Petitioners' Brief on page 5 sets forth specifications of errors to be urged in this case without specifications that any finding of the Board of Tax Appeals was unsupported by the evidence. It is elementary that a point not raised by an appellant in the lower courts cannot, for the first time, be raised in this

Court on certiorari. (*Burnet v. Commonwealth Improvement Co.*, 53 S. Ct. 198, 287 U. S. 415, 77 L. Ed. 399.) We note that the Commissioner's unspecified error raised in connection with the statement of the Circuit Court of Appeals is that the finding does not imply that the taxpayer (1) disclosed it was a personal holding company or (2) furnished information from which personal holding company tax could be *correctly* computed. From the rule applied in the *Germantown* case it will be apparent that such return, if filed in good faith, starts the running of the statute of limitations although it did not disclose that taxpayer was a personal holding company. If it furnished information from which the personal holding company tax could be computed, the fact that the computation might not be entirely correct[3] would not have the effect of constituting this as a no return case.

Although this Court in *Florsheim Bros. v. U. S.*, 280 U. S. 453, held that a mere estimate of tax would not constitute a return sufficient to start the statute of limitations running, the Court nevertheless recognized that the *Florsheim* case did not involve the rule that holds that the filing of a return which is defective or incomplete is nevertheless sufficient to start the running of the statute of limitations. In the *Florsheim* case the document filed did not purport to constitute a return, but merely a tentative form for the estimation of a tax. Petitioner refers to the return filed in the *Florsheim* case as having been made under similiar circumstances to the instant case (Petitioner's

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[3]In this case the omitted information was for the benefit of the taxpayer; not for the benefit of the Government—since the enumerated information was for the purpose of providing taxpayer with additional deductions.

Brief, p. 14). A reading of the *Florsheim* case, however, will reveal that the circumstances were not in any way similar to the instant case. Form 1031T filed in that case, was not intended to be a return, but was in compliance with section 239 of the Revenue Act of 1918 wherein provision was made for a tentative return showing an estimate of taxes only.

It will be apparent that the filing of Form 1120 has the effect of supplying the information for the determination of the surtax provided for by section 351 in a far greater manner than the filing of Form 1041 which had the effect of supplying similar information to the determination of a corporate income tax, as held in the *Germantown* case.

That the Commissioner does not squarely meet this problem in his attempt to distinguish the *Germantown* case, is apparent from the following excerpt from page 41 of Commissioner's brief in the *Simpson* case:

> "In the first place the return in that case contained all the data necessary for the assessment of the tax by the Commissioner. In the present case the return which was filed was insufficient to advise the Commissioner that any liability existed for the personal holding company tax."

The petitioner does not say that in the present case the return which was filed did not contain all the data necessary for the assessment of the tax by the Commissioner, or using the words of the Court, the data "from which a tax could be computed and assessed." As we have heretofore stated, to distinguish the *Germantown* case it would be necessary for the petitioner to establish that the return filed in the present case did not contain

data necessary for the computation of the tax by the Commissioner. To assert as a distinguishing feature that the return filed in the present case was insufficient because it did not disclose the existence of a personal holding company liability is to ascribe to the *Germantown* case *ratio decidendi*, which is absent from that decision. This Court was unconcerned in the *Germantown* case that the form therein filed did not disclose the character of the taxpayer as an association taxable as a corporation.

Petitioner seeks also to distinguish the *Germantown* case on the ground that it did not involve the statute imposing penalties for failure to file the prescribed return, but involved only the statute of limitations on making assessments (Commissioner's Brief, *Simpson* case, p. 41). Petitioner, however, does not point out any reason why a return which is sufficient to start the running of the statute of limitations is not sufficient also to avoid penalties. The decision of the Court in the *Germantown* case gave effect to sections 275 and 276 of the Revenue Act in the same manner as the venue provision of section 1002 of the Revenue Act of 1926 as amended. We know of no reason why the same reasoning does not lead to the conclusion that a return for the purposes of sections 1002, 275, 276, and 296, are not identical.

Strenuous argument is made by the Commissioner that the Commissioner's functions would be impeded if the Court in the present case followed its decision in the *Germantown* case. The argument assumes an intentional evasion by the taxpayer for the purpose of deceiving the Commissioner. If this were true, then the Commissioner would have a case of a false or fraudulent return, which would avoid the running of the

statute of limitations. It must be remembered that the instant case presents an innocent taxpayer who, in good faith, chooses an erroneous form of return, which form, nevertheless, supplies all of the information upon which the tax liability can be computed. It is not true that a premium would be placed upon taxpayers choosing the wrong form. If an intentional selection of the wrong form of return is made, this would be a clear case of a fraudulent or false return, thus invoking to the Commissioner the protection afforded by section 276(a). In so far as penalties are concerned, the Commissioner could invoke the even greater penalty of section 293(b) which provides for 50% of the total deficiency where the deficiency is due to fraud with intent to evade the tax.

Nor is the convenience of the Commissioner a reason for writing into the statute something that is not there. In the words of Justice Learned Hand of the Second Circuit dissenting in the case of *O'Sullivan Rubber Co. v. Commissioner*, 120 Fed. (2d) 845:

> "The justification for this section is that Sec. 351(c) makes applicable to the surtax all the administrative provisions of Title I: and since that Title requires a return, so must Title IA. Therefore there must be two returns, as the Commissioner has ruled. I raise no doubt as to the propriety of his ruling: but the statute did not compel it. If he had merely added to the return required by Title I the questions necessary for Title IA it would clearly have been a compliance with section 351(c); and certainly no penalty could have been then imposed. We are imposing one only because he has found it

> administratively convenient to make two bites to this particular cherry. The penalty was not meant for that; it was imposed to punish delinquents; those who either deliberately, or from indifference, made no effort at all to pay their taxes; not those who merely misunderstood duties which they tried to discharge. By recourse to what even grammatically is a bit of by no means an inexorable verbal reasoning we are perverting it from that purpose."

The Commissioner will not be hurt by a decision of this Court consistent with its decision in the *Germantown Trust Co.* case. As indicated by Justice Hand, the Commissioner can easily solve his problem by adding to the form of return required by Title I the questions necessary for Title IA. It will not require an act of Congress to accomplish this purpose. But even if such an act were necessary, the Commissioner should not be enabled to avoid the necessity thereof by substituting his regulations for legislation by the Congress.

> *Credit Alliance Co. v. Helvering*, 216 U. S. 107, 86 L. Ed. 1307, 62 S. Ct. 989.

At page 10 of the Government's Brief, in the *Simpson* case, the Commissioner states that with the exception of the decision of the Circuit Court of Appeals in the Ninth Circuit in the present case, it has been uniformly held that a taxpayer who fails to file a personal holding company return on Form 1120H even though a corporation income tax return on Form 1120 has been filed is subject to the prescribed statutory penalties for failure to file a return.

The statement is followed by a citation of the following cases:

Noteman v. Welch, 108 Fed. (2d) 206, C. C. A. 1;

O'Sullivan Rubber Co. v. Commissioner, 120 Fed. (2d) 845, C. C. A. 2;

Lone Pine v. Helvering, 121 Fed. (2d) 935, C. C. A. 2;

Logan Coal etc. v. Helvering, 122 Fed. (2d) 848, C. C. A. 3;

Gerard Investment etc., 122 Fed. (2d) 843, C. C. A. 3;

Porto Rico Coal etc. v. Commissioner, 126 Fed. (2d) 212, C. C. A. 2.

In examining these cases it is interesting to note that the courts therein became involved in considerable difficulty in trying to sustain the result reached. In the case of *O'Sullivan Rubber Co. v. Commissioner*, *supra*, the Court arrived at the same result as the first Circuit Court of Appeals in *Noteman v. Welch*, *supra*, but disagreed on reasoning. The Second Circuit Court pointed out that the basis of the decision in *Noteman v. Welch*, *supra*, was that an incomplete return did not start the statute of limitations running. The Circuit Court of Appeals for the Second Circuit realized that this was error and refused to predicate its decision upon that ground. It therefore engaged itself in the fiction of the separateness of Title I and Title IA in order to uphold the Commissioner's position. This was no easy task, and Justice Learned Hand refused to follow his brothers

on the bench and in a most able dissenting opinion pointed out the error of the majority decision. Justice Hand noted with approval the unanimous decision of the Ninth Circuit in this case. It should be noted also that the Board of Tax Appeals itself was not in agreement in the instant case. The Honorable Van Fosen, a member of the Board, basing a dissenting opinion on his belief that this case is controlled by the decision of the Supreme Court in the *Germantown* case [R. 85].

Petitioner cites *Beam v. Hamilton*, 289 Fed. 9, C. C. A. 6, and a number of cases following that decision (Commission's Brief, *Simpson* case, pp. 43-44). In so far as the Sixth Circuit Court of Appeals in 1923 in the case of *Beam v. Hamilton, supra*, is inconsistent with the decision of this Court in the *Germantown* case, we are not persuaded by its determination on such issues. We note various dissimilarities in fact between the cited case and the instant case, particularly that as in the *Germantown* case the present case involved the filing of a return in a form sufficient from which the tax could be computed, a circumstance which was not present in *Beam v. Hamilton, supra*. Also, in the latter cited case the court specifically points out that the statute as well as the regulations in express and formal terms require separate and distinct returns.

Apparently the Commissioner attempts to persuade this Court to reverse the Circuit Court of Appeals on the penalty issue, even if it does not do so with respect to the

running of the statute of limitations (Commissioner's Brief in *Simpson* case, pp. 41, 44, 45). It appears obvious, however, that if the return filed is a return sufficient for the purposes of section 275 of the Revenue Acts of 1934 and 1936 it would be a return sufficient for the purposes of section 291 of the Revenue Acts of 1934 and 1936. In the *Simpson* brief, the Commissioner cites section 406 of the Revenue Act of 1935 as being applicable to the penalty assessed in this case. We do not know just exactly how he reconciles section 406, which is a part of Title IV and apparently has no reference to income tax returns as such, with section 291 of the Revenue Acts of 1934 and 1936, respectively. In view of section 291 which specifically refers to returns under income tax statutes, it would seem that section 406 with reference to Internal Revenue tax returns is not concerned with income taxes.

It is a well established rule as announced by decisions of this and other courts that where there is any doubt as to the meaning or interpretation of a statute, it should be resolved to the benefit of the taxpayer. (*Gould v. Gould*, 38 S. Ct. 53, 245 U. S. 151, 68 L. Ed. 211.) This rule has been applied to tax statutes involving the statute of limitations. (*U. S. v. Updike*, 281 U. S. 489, 74 L. Ed. 984, 50 S. Ct. 367.)

Conclusion.

The Commissioner in his brief has said "the consequences of the decision below will be to bar forever the collection, not only of a penalty, but of a tax itself, which the taxpayer, contrary to the plainest mandate, has failed to disclose." Even if such were the result, his plea should be directed to the Congress of the United States for legislation which would avoid such an unfair result. We cannot let the statement pass, however, without commenting upon its shortsightedness. Penalties are intended as punishment for fraud, evasion or wilful or intentional neglect. The Commissioner would extend them beyond such classes merely to serve his own convenience. The Commissioner has undertaken to nullify the decision of this Court in *Germantown Trust Company v. Commissioner*, 309 U. S. 304, without benefit of Congress and because he saw fit to specify separate returns when he could just as easily have obtained all the information necessary in one return. Despite the determination of this Court that where a taxpayer, in good faith, makes the mistake of filing an erroneous return, but such return contains all of the information necessary for the computation of the tax, that under such circumstances, the statute of limitations is not avoided as in the case of the failure to file any return, the Commissioner has undertaken to substitute his law by regulation for decision of this Court. Then to make the exaggerated statement found on page 17 of his brief that in practical effect the consequences of the decision below "will be to bar forever the collection, not only of a penalty,

but of a tax itself," is to indulge in a conclusion too fanciful to require an answer. The decision of this Court in the *Germantown* case has not served "to bar forever the collection" of corporate income taxes. If the Commissioner would more carefully follow the letter of the statute in the exercise of his power to provide for the return of information in returns, he will find an easy answer to his problem. The decision of the Court below was an honest one. It followed the principles enumerated by this Court despite the implorations of a Commissioner of Internal Revenue who seeks to have the law distorted to accomplish his own convenience.

We respectfully submit that the decision of the lower court is correct and should be affirmed.

Respectfully submitted,

RAPHAEL DECHTER,
Attorney for Respondents.

HARRY A. PINES,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 115.—October Term, 1943.

Commissioner of Internal Revenue, Petitioner, vs. Lane-Wells Company and Technicraft Engineering Corporation. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 14, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

The Lane-Wells Company is a transferee and successor of the taxpayer Technicraft Engineering Corporation and as such is liable for its taxes. The Commissioner, the Board of Tax Appeals,[1] and the Circuit Court of Appeals[2] have held that Technicraft was a personal holding company in 1934, 1935, and 1936, and that question is no longer open.

For the years named, Technicraft filed the usual corporation income tax returns on Treasury Form 1120. On this form the following appeared: "Is the corporation a personal holding company within the meaning of section 351 of the Revenue Act of 1934 [or the appropriate year]? (If so, an additional return on Form 1120H must be filed.)" To this each year Technicraft answered, "No." In none of the years in question did it file a personal holding company return on Form 1120H. It was advised, and in good faith believed, that it was not a personal holding company within the meaning of the Act.

The Commissioner relies upon the taxpayer's alleged default in two respects. First, the deficiency notices were given within three years of the filing of the corporate return on Form 1120 for the year 1936, but not within three years of such returns for 1934 and 1935 and not within four years (the period as to a transferee) of the 1934 return. Hence, a part of the tax is barred by the statute of limitations if the return filed is the only one required to start the statute. Second, the Commissioner has assessed and the Board has upheld as to each year a 25 per cent penalty for failure to file the personal holding company return.

[1] 43 B. T. A. 463.

[2] 134 F. 2d 977, 980.

The Court of Appeals for the Ninth Circuit reversed the decision of the Board of Tax Appeals. It held the one return sufficient to start the running of the limitation statute as to both income taxes and personal holding company taxes and held that there was no default warranting imposition of the penalty. This decision conflicted with that of the Court of Appeals for the Second Circuit in *Simpson & Co.* v. *Commissioner*, 128 F. 2d 742, and we granted certiorari.

Prior to 1934, as now, personal holding companies were liable for the regular corporation income taxes under Title I of the Revenue Acts and they, like all other corporations, were subject to additional tax upon an accumulation of profits where there was present a purpose of avoiding surtaxes upon shareholders.[3] The obscurity of corporate taxpayers' purposes and difficulties of proof made the latter tax something of a dead letter in practice, and a new tax was devised "to provide for a tax which will be automatically levied upon the holding company without any necessity for proving a purpose of avoiding surtaxes."[4] The new tax was included in a separate title of the Revenue Act of 1934, Title IA—Additional Income Taxes, and constituted Section 351, entitled Surtax on Personal Holding Companies. As part (e) thereof it enacted that administrative provisions, including penalties, applicable in respect of the taxes imposed by Title I should apply in respect of the tax imposed by this section.[5] It seems clear that this section created a new tax separate from that on income of ordinary corporations.

Among the administrative provisions of Title I incorporated by reference in the personal holding company tax section are § 54(a),[6] which requires one liable for such tax to "make such returns and comply with such rules and regulations, as the Commissioner with

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[3] *E. g.*, Revenue Act of 1932, § 104, 47 Stat. 195.

[4] Sen. Rep. No. 558, 73d Cong., 2d Sess., p. 15; 1939-1 Cum. Bull. (Part 2) 586, 596.

[5] § 351(e) provides: "All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable." 48 Stat. 752.

[6] § 54(a) provides: "Every person liable to any tax imposed by this title or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe." 48 Stat. 698.

the approval of the Secretary may from time to time prescribe," and § 62, which directs the Commissioner to prescribe and publish "all needful rules and regulations for the enforcement of this title."[7] Pursuant thereto Treasury Regulations were promulgated providing unequivocally: "A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120H."[8]

The taxpayer has not complied with this regulation. It says, however, that its regular corporation income tax return must be taken as an equivalent to the separate return, under our decision in *Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304, both for starting the period of limitation and for avoiding the penalty. The taxpayer in the *Germantown* case filed a return on a wrong form The return contained, however, "all of the data from which a tax could be computed and assessed although it did not purport to state any amount due as tax," and the Court said, "this defect falls short of rendering it no return whatever." 309 U. S. at 308, 310. There the only liability involved was for a Title I income tax, and the return was addressed to that liability, as to which the court held that it set the statute of limitations running. Here the taxpayer is under liabilities for two taxes and under an obligation to file two returns, and it says that one return addressed to but one of the liabilities answers the purpose of both.

It is contended by the Government that the returns in the present case were insufficient to advise the Commissioner that any liability existed for the holding-company tax. The Board of Tax Appeals found that the returns filed by the corporation disclosed its gross income and deductions and its resulting net income. 43 B. T. A. 470, 471. The Circuit Court of Appeals construed this as finding that they "showed all the facts necessary for respondent to compute the taxes as a personal holding company obligation." 134 F. 2d at 978. But it seems admitted that the returns did not show the facts on which liability would be predicated. Such liability was expressly denied by the return, and to obtain data on which corporations subject to the tax could be identified and assessed was the very purpose of requiring a separate return ad-

[7] § 62 provides: "The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title." 48 Stat. 700.

[8] Regulations 86 and 94, Article 351-8.

dressed to that liability. Taxpayer says that the information called for by Form 1120 H is information that could have been called for by Form 1120. We assume so, but we do not see how the fact helps the taxpayer, for the Treasury was fully within the statute in requiring that information in a separate return.

Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. It thus implements the system of self-assessment which is so largely the basis of our American scheme of income taxation. The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished. For such purposes the regulation requiring two separate returns for these taxes was a reasonable and valid one and the finding of the Board of Tax Appeals that the taxpayer is in default is correct.

Since no personal holding company returns were filed, the statute of limitations did not commence to run,[9] and the assessment of the tax was not barred.[10]

Since the taxpayer defaulted in filing a required return for the years 1934 and 1935, the 25 per cent penalty in the applicable acts became mandatory[11] and was correctly upheld by the Board of Tax Appeals.

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[9] The statute provides: "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time." § 276(a), 48 Stat. 745.

[10] The Treasury Regulation also provided: "The same provisions of law relating to the period of limitation for assessment and collection which govern the taxes imposed by Title I also apply to the surtax imposed under Title IA. However, since the surtax imposed under Title IA is a distinct and separate tax from those imposed under Title I, the making of a return under Title I will not start the period of limitation for assessment of the surtax imposed under Title IA. If the corporation subject to section 351 fails to make a return, the tax may be assessed at any time." Regulations 86, Art. 351-8.

The Court of Appeals thought this unauthorized. As we have indicated, we do not agree that it was beyond the delegated authority, and it appears only to declare what was even otherwise the law.

[11] The 1934 statute reads: "In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax." § 291, 48 Stat. 746. A 25 per cent penalty is likewise mandatory in this case under § 406 of the Revenue Act of 1935, 49 Stat. 1014.

1. This provision excuses late filing, for reasonable cause, but not complete failure to file.

For 1936 the penalty presents a different question. The statute applicable provides that it could be lifted if it were shown that such failure was "due to reasonable cause and not due to wilful neglect." Revenue Act of 1936, § 291, 49 Stat. 1727. The Board has made no finding on that subject, apparently assuming that the mandatory provisions applied to all years. The question is one of fact in the first instance for the Board's determination. *Dobson* v. *Commissioner*, — U. S. —. The Government does not object to a remand to the Board for the limited purpose of reconsidering the imposition of the 25 per cent penalty for the year 1936 only, if the respondent shall seasonably apply to the Board therefor. In all things else the decision of the Board of Tax Appeals is affirmed. The judgment of the Court of Appeals is reversed, and the cause remanded with directions to remand to the Tax Court for further proceedings in accordance with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.